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No. 10-(1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

WALTER MCGILL, PETITIONER,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS AND THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AN UNINCORPORATED ASSOCIATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Religious Freedom Restoration Act provides that the "government" may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the application of the burden to the person is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1.

The Act defines the term "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1). Further, the Act provides that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." *Id.* § 2000bb-3(a).

The question presented is:

Whether the Religious Freedom Restoration Act applies to a private civil action under a federal statute in federal court, even when the United States is not a party to the action.

PARTIES TO THE PROCEEDING

The parties are as stated in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Walter McGill respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App., *infra*, 1a-32a) is reported at 617 F.3d 402. An earlier decision of the district court is reported at 624 F. Supp. 2d 883. The opinion of the district court entering a finding of contempt (App., *infra*, 33a-36a) is not reported but is available at 2010 WL 99404.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on August 10, 2010.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Religious Freedom Restoration Act is set forth at App., *infra,* 37a-40a.

INTRODUCTION

The court of appeals weighed in on a circuit split regarding the proper interpretation of the Religious Freedom Restoration Act (RFRA). The recurring question that has now evenly divided six circuits is whether RFRA has any application to civil actions between private parties in federal court applying

federal law. The issue arises in varied circumstances, including intellectual property disputes, employment discrimination claims, and bankruptcy proceedings.

The better view is that RFRA offers a defense to all federal laws, including federal laws that are enforced by private parties in civil actions in federal court. That is so because the burden on the individual's exercise of religion is no less caused by the government because it results from a private federal cause of action resolved by a federal court than through direct government enforcement. That is the view followed by the Second, Eighth, and D.C. Circuits. And that view is supported by the text and history of RFRA.

The court below, by contrast, incorrectly held that RFRA had no application to this civil suit regarding whether federal law and federal courts could prohibit petitioner from using the term "Seventh-day Adventist" in the name of his church. The failure to apply RFRA's statutorily-mandated strict scrutiny was error that warrants this Court's review.

STATEMENT OF THE CASE

A. Statutory Framework

1. The Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, was a response to this Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Congress explained, in the express statutory findings accompanying RFRA,

that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress found, however, that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2).

Congress thus articulated two purposes in enacting RFRA. First, "to guarantee" the application of the "compelling interest test" in "all cases where free exercise of religion is substantially burdened." *Id.* § 2000bb(b)(1). And second, "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b)(2).

To fulfill these purposes, Congress provided that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the application of the burden to the person is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(a) & (b)(2). A person may assert a violation of RFRA "as a claim or defense in a judicial proceeding" and may "obtain relief against a government." *Id.* § 2000bb-1(c).

As originally enacted, RFRA defined "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." It provided that RFRA applied "to all

Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act."

2. This Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA was not constitutional as applied to State and local governments because it exceeded Congress's enumerated powers under the Fourteenth Amendment. The lower courts subsequently held that RFRA was still valid as applied to the federal government and federal territories and possessions. *See, e.g.*, *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998).

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc et seq.). Unlike RFRA's broad application to "all" state law, RLUIPA targeted specific state and local practices that Congress believed were particularly burdensome to religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). Congress did so under its authority under the Spending and Commerce Clauses and the Fourteenth Amendment. *Id.* at 715.

In addition, RLUIPA amended RFRA in three ways. First, it amended the definition of "government" in Section 2000bb-2 of RFRA to remove reference to States and their subdivisions, and to add references to the District of Columbia, Puerto Rico and federal territories. Second, RLUIPA removed the

reference to "State law" in Section 2000bb-3(a) of RFRA. And third, RLUIPA amended the definition of "exercise of religion" in Section 2000bb-2(4) of RFRA to incorporate a new, more expansive definition of the term adopted in Section 2000cc-5(7) of RLUIPA.

B. Factual Background

1. Petitioner was the founder and pastor of a church in Guys, Tennessee, that he named "A Creation Seventh Day & Adventist Church," and which is part of a worldwide body he named "The Creation Seventh Day & Adventist Church." Petitioner named the church based on a divine revelation. App., *infra*, 5a-6a; Dt. Ct. Dkt. 30, Exh. A at 2.

Petitioner has also created internet domain names, including "creation-7th-dayadventist-church.org," "creationseventhday-adventistchurch.org," "creations da.org," and "csda.us." App., *infra*, 6a.

Respondent General Conference of Seventh-day Adventists was formed in 1863. Since the official formation of the church, the names "Seventh-day Adventist" and "SDA" have been used by the Seventh-day Adventist Church. Respondent General Conference Corporation of Seventh-day Adventists holds title to all of the church's assets. It has registered the marks "Seventh-day Adventist," "Adventist," and "General Conference of Seventh-day Adventists," with the United States Patent and Trademark Office. Respondents have not granted petitioner any licenses to use their marks. App., *infra*, 5a-6a.

2. Respondents filed a complaint against petitioner in federal district court alleging trademark infringement, unfair competition, and dilution of marks under the federal Lanham Act, 15 U.S.C. §§ 1114, 1125(a), 1125(c); cybersquatting under 15 U.S.C. § 1125(d)(1); as well as parallel Tennessee state law claims. App., *infra*, 6a-7a.

Respondents asked the district court to enter an injunction prohibiting petitioner from using the marks, delivering to the Clerk of the Court all infringing materials for destruction, and transferring all petitioner's internet domain names to respondents. Dt. Ct. Dkt. 1 at 18-19. In addition, respondents asked the district court to award actual and statutory damages as well as attorneys' fees and costs. *Id.* at 19.

Petitioner moved to dismiss the claims on the ground that, *inter alia*, RFRA barred application of federal law in a way that substantially burdened his exercise of religion. The district court denied this portion of petitioner's motion to dismiss on the ground that petitioner had waived the RFRA defense by failing to raise it in his answer. App., *infra*, 7a.

The district court subsequently granted respondents' summary judgment on their infringement claims with respect to "Seventh-day Adventist," but denied summary judgment with respect to "Adventist" and "SDA." App., *infra*, 7a-8a.

Prior to any further proceedings on the merits, the district court referred the case to a magistrate judge for purposes of mediation after counsel had

agreed to mediate. Petitioner then filed a motion to amend the pretrial order to remove the mediation requirement because his "religious convictions will not allow him to compromise his faith." App., *infra*, 8a. The district court denied petitioner's motion to amend. App., *infra*, 8a-9a.

After petitioner refused to participate in mediation, the district court granted respondents' motion for a default judgment. App., *infra*, 9a. It entered an injunction that prohibited petitioner from "using the mark SEVENTH-DAY ADVENTIST, including the use of the words SEVENTH-DAY or ADVENTIST, or the acronym SDA, either together, apart, or as part of, or in combination with any other words, phrases, acronyms or designs * * * in the sale, offering for sale, distribution, promotion, provision or advertising of any products and services, and including on the Internet." Dt. Ct. Dkt. 98 at 12 n.9. The injunction required petitioner to deliver any infringing "labels, signs, prints, packages, wrappers, receptacles, and advertisements" to respondents or permanently dispose of them himself. *Id.* at 13 n.9.

The injunction stated that "[s]ubject to the foregoing," petitioner could "use these terms in a non-trademark sense." *Ibid.* The injunction gave examples of such permitted uses: "oral or written use of the marks to refer to the [respondents]" or "oral or written use of certain terms in a non-trademark descriptive sense, such as 'this Church honors the Sabbath on the "seventh day,"' or 'the members of this church believe in the "advent" of Christ.'" *Ibid.*

3. The court of appeals affirmed. App., *infra*, 1a-32a. The court addressed the applicability of RFRA because it determined that the default judgment did not preclude review of whether the motion to dismiss should have been granted. App., *infra*, 10a.

The court of appeals held that "RFRA would appear to trigger strict scrutiny in this case." App., *infra*, 16a. It explained that to trigger strict scrutiny, a party must show a governmental action that "(1) substantially burden[s], (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held." App., *infra*, 16a. The court noted that "no one has questioned the sincerity of [petitioner's] belief that God requires him to continue his infringing use of the plaintiffs' marks." The court also acknowledged that "[b]eing compelled to stop could substantially burden his religious practice." App., *infra*, 16a.

The court of appeals held, nonetheless, that petitioner "cannot claim the benefit of RFRA" because "the defense does not apply in suits between private parties." App., *infra*, 17a. The court relied almost exclusively on the dissenting opinion by then-Judge Sotomayor in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006). App., *infra*, 17a-19a.

The court of appeals expressly refused to "follow the *Hankins* majority" that "found RFRA's language broad enough to apply 'to an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute

substantially burdens his or her exercise of religion.'" App., *infra*, 19a (quoting *Hankins*, 441 F.3d at 103).

Because the court of appeals ruled against petitioner's RFRA claim on that threshold ground, it did not decide whether the district court erred in finding that RFRA was an affirmative defense that had to be raised in his answer to the complaint. App., *infra*, 17a n.3.

The court of appeals then held that, absent RFRA's application, summary judgment was properly entered for respondents under the Lanham Act with regard to the "Seventh-day Adventist" mark. App., *infra*, 27a-32a.

4. While the case was on appeal, respondents sought to enforce the injunction against petitioner. The district court found that petitioner had willfully failed to abide by the injunction by, *inter alia*, using signs and promotional materials that used respondents' marks. App., *infra*, 34a.

The district court thus authorized respondents and their agents "to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order." App., *infra*, 36a. Respondents' agents removed the church signs and other infringing materials from petitioner's church on

February 16, 2010, Dt. Ct. Dkt. 136 at 6, and again on October 6, 2010, Dt. Ct. Dkt. 148 at 4.[1]

Respondents believe they possess the "ongoing authority to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order" based on the "standing authority of the prior Orders of the Court." Dt. Ct. Dkt. 148 at 4 n.1.

REASONS FOR GRANTING THE PETITION

REVIEW IS NECESSARY BECAUSE SIX COURTS OF APPEALS ARE EVENLY DIVIDED AS TO WHETHER ALL PRIVATE LITIGATION APPLYING FEDERAL LAW IN FEDERAL COURTS IS EXCLUDED FROM RFRA'S SCOPE

A. The Ruling Below Joins One Side Of A Circuit Split Regarding RFRA's Application That Will Not Be Resolved Absent This Court's Review

There is now a 3-to-3 circuit split on the question presented. Contrary to the decision below, the Second, Eighth, and D.C. Circuits have held that RFRA creates a defense in private civil litigation

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[1] Currently pending before the district court is a report and recommendation by a magistrate judge that petitioner be found in contempt for encouraging another person to restore the signs to the church, as well as for failing to comply with discovery requests. Dt. Ct. Dkt. 136 at 6, 8. Petitioner himself is currently in Africa doing mission work. *Id.* at 3.

involving federal law. The Sixth Circuit acknowledged that this was an issue that had divided the courts of appeals (App., *infra*, 19a), and joined the views of the Fifth and Seventh Circuits. The Ninth Circuit has expressed doubts about RFRA's applicability to private civil actions, but twice avoided resolving the issue. This Court's review is necessary so that RFRA's broad protections are uniformly available nationwide.

1. In *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), the Second Circuit held (over a dissent from then-Judge Sotomayor) that RFRA applied in a private suit brought by a minister who sued his church regarding his compulsory retirement under the federal Age Discrimination in Employment Act (ADEA).

The majority in *Hankins* explained that RFRA's statutory text provides that it applies to "all federal law, and the implementation of that law" and permits a defendant to assert a violation of RFRA "as a defense in a judicial proceeding." *Id.* at 103 (quoting 42 U.S.C. §§ 2000bb-3(a), 2000bb-1(c)). This broad language "easily covered" the case before the court, the majority held. *Ibid.* The court held that the "only conceivably narrowing language"—which prescribed that a litigant could "obtain appropriate relief against a government"—was best read as broadening the remedies of the statute. *Ibid.* The majority held that RFRA applied to all litigation in which federal law substantially burdened the exercise of religion, not

merely that litigation in which the government was a party. *Ibid.*[2]

The Eighth Circuit also has held that RFRA applies in a case in which the United States was not a party. *See Christians v. Crystal Evangelical Free Church (In re Young)*, 82 F.3d 1407, 1416-1417 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998). The court explained that "[t]he bankruptcy code is federal law, the federal courts are a branch of the United States, and [the court's] decision would involve the implementation of federal bankruptcy law." *Id.* at 1417. It thus held that a federal court's implementation of federal law falls within the ambit of "government" as defined by RFRA, rendering the statute applicable. *Ibid.* More broadly, the Eighth Circuit held that RFRA must be interpreted as amending all federal law, "engraft[ing] [an] additional clause to [the Bankruptcy Code] that a recovery that places a substantial burden on a debtor's exercise of religion will not be allowed" unless it satisfies the

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[2] *Hankins* remains the law in the Second Circuit. The Sixth Circuit noted (App., *infra*, 20a) that in a subsequent case a different panel of the Second Circuit expressed a preference for the views of the dissent in *Hankins*. *See Rweyemamu v. Cote*, 520 F.3d 198, 204 (2d Cir. 2008). But that decision did not and could not have overturned *Hankins*. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.) (panel bound by prior panel decision unless overruled en banc or by Supreme Court), cert. denied, 543 U.S. 908 (2004).

exception provided by RFRA. *In re Young*, 141 F.3d at 861.

The D.C. Circuit also applied RFRA to bar a private plaintiff's federal action in *EEOC v. Catholic University of America*, 83 F.3d 455, 467-470 (D.C. Cir. 1996). That appeal arose from two actions—one brought by a private plaintiff and one brought by the EEOC. By applying RFRA to bar the private plaintiff's claims as well as the EEOC's, the D.C. Circuit effectively held that RFRA applies to private parties.

2. The Seventh Circuit, by contrast, has held that RFRA does not apply to suits between purely private parties and rejected the *Hankins* decision. *See Tomic v. Catholic Diocese of Peoria,* 442 F.3d 1036 (7th Cir.), cert. denied, 549 U.S. 881 (2006). Citing the use of the word "government" in RFRA, Judge Posner summarily concluded: "The decision [*Hankins*] is unsound. RFRA is applicable only to suits to which the government is a party." *Id.* at 1042.

Likewise, the Fifth Circuit, in an unpublished opinion, affirmed a published district court decision holding that RFRA does not apply to private parties. *Boggan v. Mississippi Conference of the United Methodist Church*, 433 F. Supp. 2d 762 (S.D. Miss. 2006), aff'd, 222 Fed. App'x 352 (5th Cir.), cert. denied, 552 U.S. 813 (2007).

3. Finally, in this case, the Sixth Circuit relied on two Ninth Circuit cases that further demonstrate the need for this Court's review. App., *infra*, 20a.

In *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 837-838 (9th Cir. 1999), the Ninth Circuit merely held that the defendant hospital was not acting under "color of law" when it refused to hire a plaintiff who would not provide his social security number to the hospital as federal law required.

Subsequently, the Ninth Circuit declined to resolve the "knotty question" whether RFRA applied to private litigation. It simply assumed it did and held that the defendant had not demonstrated a substantial burden on its exercise of religion. The court noted, however, that "[i]t seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation." *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000), cert. denied, 532 U.S. 958 (2001).

The division in the courts of appeals is mature, recurring and widespread. No appellate court that has decided the question presented has switched sides, and there are reasoned rulings on both sides of the conflict. There is no reason to believe that this conflict can be resolved absent this Court's review. On that basis alone, certiorari should be granted.

B. The Decision Below Contravenes RFRA's Text And The History Of Its 2000 Amendments

The Court also should grant review because the ruling below cannot be reconciled with RFRA's text and history.

1. RFRA's broad text demonstrates its applicability to all private civil actions in federal court

a. By its plain language, RFRA applies to "all Federal law." 42 U.S.C. § 2000bb-1. By using such expansive text, RFRA is best understood as an amendment to the "*entire* United States Code" to prohibit unwarranted substantial burdens on the exercise of religion. *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) (emphasis added); *see also In re Young*, 141 F.3d at 856; *Worldwide Church of God*, 227 F.3d at 1120; *Catholic Univ. of Am.*, 83 F.3d at 468. RFRA therefore amended every federal statute creating private causes of action, including the Lanham Act, to limit their applicability in cases where a significant burden is placed on the exercise of religion. Had Congress intended to cabin RFRA like the ruling below, it would have drafted the statute to apply only to "all Federal law in cases where the United States is a party."

b. RFRA's definition of "government" as including a "branch" of the United States, 42 U.S.C. § 2000bb-2(1), further demonstrates that RFRA applies to private civil actions brought in federal

court. The term "branch" of the United States unambiguously includes the federal courts. BLACK'S LAW DICTIONARY 864 (8th ed., 1st reprint 2004) (defining "judiciary" as that "branch of government responsible for interpreting the laws and administering justice"). Indeed, the United States has urged the same reading of RFRA. It argued that "a ruling by this Court itself concerning applicability of [the bankruptcy provision] would constitute 'implementation' of that law [by a government], since RFRA applies to all branches and units of federal, state, and local government." U.S. Brief as Intervenor at 29, *In re Young*, 82 F.3d 1407 (8th Cir. 1996) (No. 93-2267). The Eighth Circuit reached the same conclusion on this point. *In re Young*, 82 F.3d at 1416-1417.[3]

RFRA's definition of "government" as including a "person acting under color of law" likewise demonstrates RFRA's application to civil litigation. A federal judge is plainly acting under color of law. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (judge "beyond all question is a state actor"). And, at many stages of a civil action, a private litigant may also act "under color of law." *See, e.g., id.* at

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[3] The United States ultimately withdrew its appellate brief in that case (which urged that RFRA applied but that the religious claimant should lose) because the President did not believe it was supportive enough of the religious claimant. *In re Young*, 82 F.3d at 1413; Drew S. Days, III, *When the President Says 'No': A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 517-518 (2001).

623-628 (jury selection); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982) ("invoking the aid of state officials to take advantage of state-created attachment procedures").[4]

c. Moreover, Congress intended RFRA to mimic the scope of the Free Exercise Clause, which applies in civil litigation where the government is not a party because courts are part of the government. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (First Amendment applies to state law governing private tort actions).

RFRA's preambulatory findings and statement of purpose made clear that Congress intended to supplement the Free Exercise Clause (as interpreted by this Court in *Smith*) by applying the "compelling interest test" in "*all* cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (emphasis added). Indeed, in holding RFRA unconstitutional as applied to state and local governments, this Court explained:

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[4] In this case, for example, respondents claim that the district court gave them the "ongoing authority" to enter petitioner's church "to remove and permanently dispose of [petitioner's] signs and promotional materials that violate the Injunction Order." Dt. Ct. Dkt. 148 at 4 n.1.

> Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. * * * Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

d. Nor does the fact that Section 2000bb-1(b) imposes the obligation on the "government [to] demonstrate * * * that the application of the burden" is the least restrictive means of furthering a compelling governmental interest counsel against the application of RFRA to this case. App., *infra*, 18a-19a.

There is nothing unusual about a private party being required to prove that a statute satisfies heightened scrutiny. For example, RFRA authorizes individuals to bring RFRA claims seeking appropriate relief from "official[s]" and "other person[s] acting under color of law." 42 U.S.C. § 2000bb-2(1). That authorization encompasses suits against federal officials in their individual capacities for money damages. *See Availability of Money Damages under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 182-183 (1994). In those suits, the federal government is not a necessary party and the Department of Justice may not represent the named individual. In such instances, a private individual must demonstrate that the substantial burden on religion

was justified by a compelling interest and was narrowly tailored to that interest.

Indeed, private parties often have been called on to demonstrate that a statute is narrowly tailored and furthers a compelling government interest. *See, e.g., Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) (in private suit under state law that involved burden on First Amendment right to associate, Court addressed State's compelling interest even in absence of State as party); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (same); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (in custody suit between private parties in which state court considered race, Court applied strict scrutiny even in the absence of State as a party).[5]

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[5] That was, moreover, precisely what Congress expected would happen. *See* 145 Cong. Rec. H5590 (daily ed. July 15, 1999) (statement of Rep. Conyers) (federal law "would require individuals proceeding under such State and local antidiscrimination law to prove that the law they wish to utilize is a least restrictive means of furthering a compelling governmental interest"); *see also Religious Liberty: Hearing Before the S. Judiciary Comm.,* 106th Cong. 155, 163 (1999) (in response to questions on this point, Gene C. Schaerr and Chai Feldblum both noted that the burden would initially fall on private plaintiffs but that relevant government agencies and interest groups could intervene to defend the law if needed).

2. The ruling below is contrary to RFRA and its amendment's legislative history

Review is also warranted because the ruling below cannot be reconciled with RFRA's legislative history.

RFRA was enacted against the backdrop of private litigation burdening the exercise of religious freedom. Many of the problems Congress heard about prior to enacting RFRA involved civil litigation between private parties. In enacting the original statute, Congress relied on a Congressional Research Service report that cited a number of examples, including a private wrongful death suit in which a Jehovah's Witness's decision to refuse blood transfusions was relied on to avoid liability; a private discrimination suit against the Boy Scouts under a public accommodations law; a private suit to enforce the Age Discrimination in Employment Act; a private suit by an associate pastor against a church for wrongful termination; and a private suit by Planned Parenthood against an anti-abortion activist. *See* David Ackerman, Congressional Research Serv., Library of Congress, *The Religious Freedom Restoration Act and*

the Religious Freedom Act: A Legal Analysis 14-17 (1992).[6]

Moreover, after this Court held in *City of Boerne* that RFRA was unconstitutional as applied to state and local governments, Congress again considered whether the compelling interest standard should apply to States and localities in a proposed act called the Religious Liberty Protection Act (RLPA), which would have also amended RFRA.

Opposition arose on the ground that the compelling interest standard would be used to challenge the application of anti-discrimination laws in employment, housing, and public accommodation—all of which were enforceable through private civil actions. Because RLPA would, like RFRA, "authorize[ ] individuals to raise a religious liberty affirmative defense in any judicial proceeding," the defense "could be asserted against federal civil rights plaintiffs in cases concerning disability, sexual orientation, familial status and pregnancy." H.R. Rep. No. 106-219, at 38 (1999) (dissenting views). And opponents to RLPA noted that RFRA had previously been applied to private

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[6] Extensive hearing testimony provided further examples before Congress. *See, e.g., Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil & Const. Rights of the H. Comm. on the Judiciary*, 102d Cong. 363-369 (1992) (testimony regarding private civil litigation where Free Exercise claim was raised and where RFRA would apply a different test); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Senate Comm. on Judiciary*, 102d Cong. 52-55, 65, 158-159 (1992) (same).

civil actions. *See Religious Liberty: Hearing Before the Senate Judiciary Comm.*, 106th Cong. 68 (1999) (statement of Sen. Leahy) (discussing court's reliance on RFRA in child support dispute in *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994)); 145 Cong. Rec. H5591 (daily ed. July 15, 1999) (statement of Rep. Conyers) (warning that passage of RLPA would permit reliance on statutory religious liberty defense in private actions for child support, wrongful death, and civil discovery requests).

Supporters likewise understood that RLPA would extend to private civil actions. The House Report gave the examples of private "litigants attempting to discover sacred confessional information for use in civil lawsuits" as "instances where government action thwarts the fulfillment of religious sacraments." H.R. Rep. No. 106-219, at 9; *see also* 145 Cong. Rec. H5588 (daily ed. July 15, 1999) (statement of Rep. Canady) ("While RFRA was on the books, successful claimants included * * * the Catholic University of America, which was sued for gender discrimination by a canon-law professor denied tenure.").

In the end, Congress did not enact RLPA but enacted RLUIPA, which targeted state and local land use and treatment of prisoners. But at the same time, Congress did not reduce RFRA's breadth as applied to the federal government. Instead, Congress amended RFRA to remove its references to States in order to "clarif[y] that RFRA applies to federal law, policies, property, and employees." H.R. Rep. No. 106-219, at 13 n.48. It did nothing to restrict the RFRA's

scope, which had, to that point, consistently been applied broadly to encompass private civil actions.

C. The Sixth Circuit's Holding Addresses An Issue Of Continuing Importance And This Case Presents The Issue In An Ideal Posture

1. The Court should review and reverse the Sixth Circuit's decision because it affects a broad swath of law.

The question presented arises in numerous contexts on a regular basis in federal court where the government plays limited, if any, enforcement role in civil litigation. As in the present case, it can arise in cases involving intellectual property. *See Worldwide Church of God*, 227 F.3d at 1121 (copyright); *Urantia Found. v. Maaherra*, 895 F. Supp. 1335 (D. Ariz. 1995) (copyright and trademark).

It also comes up in the bankruptcy context, where efforts by creditors to recover funds the debtor gave a religious entity or to force the debtor to sell religious property to pay debts substantially burdens the debtors' exercise of religion. *See, e.g.*, *Tort Claimants Comm. v. Roman Catholic Archbishop of Portland (In re Roman Catholic Archbishop of Portland)*, 335 B.R. 842 (Bankr. D. Or. 2005); *Watson v. Boyajian*, 309 B.R. 652 (B.A.P. 1st Cir. 2004).

And private suits for employment discrimination against religious employers also arise on a regular

basis. *See Redhead v. Conference of Seventh-day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006) (pregnancy discrimination); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (age discrimination); *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994) (age discrimination); *see also Intermountain Fair Housing Council v. Boise Rescue Mission*, No. CV-08-205, 2010 WL 1913379 (D. Idaho May 12, 2010) (claim of sex discrimination by religious organization under Fair Housing Act).

The interpretation of RFRA also has consequences for state law. Since *Boerne*, thirteen States have enacted provisions virtually identical to RFRA to govern their own laws and practices. *See Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 261 n.47 (3d Cir. 2008) (collecting laws). State courts, in turn, have looked to the federal courts' interpretation of the federal RFRA in giving content to these state laws. *See, e.g., Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute."); *Diggs v. Snyder*, 775 N.E.2d 40, 44 (Ill. App. Ct. 2002) ("[w]e may therefore turn to federal cases for guidance"); *In re Multi-Circuit Episcopal Church Prop. Litig.*, 76 Va. Cir. 873, 879 (2008)

(looking to the federal RFRA as persuasive). These decisions further demonstrate the importance of definitively resolving RFRA's applicability to private litigation.

2. This case presents the ideal vehicle to address an issue that has divided the courts. As the court of appeals recognized, petitioner plainly has sincerely-held religious beliefs. App., *infra*, 16a. Further, the issue is properly preserved, having been both pressed by petitioner at every stage and passed on below.

Finally, the issue is purely one of statutory construction regarding the scope of RFRA's coverage. If the Sixth Circuit is reversed on that threshold question, the case will have to be remanded for further proceedings on whether petitioner has established a prima facie case under RFRA and, if so, whether the application of the Lanham Act to petitioner comports with strict scrutiny.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 8, 2010

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, an Unincorporated Association, *Plaintiffs-Appellees,*	No. 09-5723
v.	
WALTER MCGILL, d/b/a CREATION 7TH DAY ADVENTIST CHURCH et al., *Defendant-Appellant.*	

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
No. 06-01207 – J. Daniel Breen, District Judge.

Argued: March 11, 2010

Decided and Filed: August 10, 2010

Before: KENNEDY, MOORE, and
SUTTON, Circuit Judges.

COUNSEL

ARGUED: Charles L. Holliday, SPRAGINS, BARNETT & COBB, PLC, Jackson, Tennessee, for

Appellant. Joel T. Galanter, ADAMS AND REESE LLP, Nashville, Tennessee, for Appellees. **ON BRIEF:** Charles L. Holliday, SPRAGINS, BARNETT & COBB, PLC, Jackson, Tennessee, for Appellant. Joel T. Galanter, ADAMS AND REESE LLP, Nashville, Tennessee, Emily C. Taube, ADAMS AND REESE LLP, Memphis, Tennessee, for Appellees.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiffs General Conference Corporation of Seventh-day Adventists ("General Conference Corporation") and General Conference of Seventh-day Adventists ("General Conference") sued Walter McGill for trademark infringement based on McGill's use of their protected marks in advertising and promoting his breakaway church. McGill brought a motion to dismiss based on the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), which the district court denied. The district court later granted partial summary judgment for the plaintiffs. After McGill's repeated refusal to appear for a court-ordered mediation to which he had initially consented, the district court entered default judgment against him. He now appeals. For the reasons discussed below, we **AFFIRM**.

I. BACKGROUND

The district court discussed the relevant background of the litigation:

> General Conference Corporation of Seventh-day Adventists . . . is a corporation whose principal place of business is located in Maryland. ([Docket Entry ("D.E.")] No. 37, Pls.' Statement of Undisputed Facts ¶ 9.) The other Plaintiff, General Conference of Seventh-day Adventists . . . is an unincorporated association that represents the interests of the Seventh-day Adventist Church. (*Id.* ¶ 10.) The General Conference was formed in 1863, marking the official organization of the Seventh-day Adventist Church. (D.E. No. 21, George W. Reid ThD's Expert Report ¶ 13.) The church grew out of several congregations that believed that Christ's Second Advent was imminent and that the Sabbath should be observed on the seventh day of the week. (*Id.* ¶ 1.) The Plaintiffs' expert, George Reid ThD, asserts that none of these early churches called themselves "Seventh-day Adventist" and that it was not until the congregations came together to create a formal church structure that the name "Seventh-day Adventist" was chosen. (*Id.* ¶¶ 8-10.) Since the official formation of the church, the names "Seventh-day Adventist" and "SDA" have been used by the Seventh-day Adventist Church as the church's name, and as its trade name in advertising and publishing. (D.E. No. 37, Pls.' Statement of Undisputed Facts ¶ 40.) The church today

has approximately 968,604 members in the United States, as well as 3,529 ministers and 5,316 congregations. (*Id.* ¶ 44.) Worldwide, it has over fourteen million members, 16,892 ministers, and 121,625 congregations. (*Id.*)

The Corporation holds title to all of the church's assets. (D.E. No. 37, Pls.' Statement of Undisputed Facts ¶ 11.) It has registered the marks "Seventh-day Adventist," "Adventist," and "General Conference of Seventh-day Adventists," with the United States Patent and Trademark Office. (*Id.* ¶¶ 17-23.) Registration number 1,177,185 protects the use of the "Seventh-day Adventist" mark on religious books, magazines, pamphlets, newsletters, brochures, encyclopedias, dictionaries, commentaries, fliers, bulletins, yearbooks, booklets, and bibles. (*Id.* ¶ 25.) It also protects its use for the establishment and administration of employee health care and benefit programs and medical insurance programs, as well as educational instruction services at the grade school, high school, and college level, and for film production and distribution services, health care services, and religious observances and missionary services. (*Id.*) Registration numbers 1,176,153 and 1,218,657 protect[ ] the "Advent[ist]" mark for the same purposes. (*Id.* ¶¶ 26-27.) Registration number 1,171,760 protects the "General Conference of Seventh-day Adventists"

mark for church services. (*Id.* ¶ 28.)[1] "SDA" is an acronym for "Seventh-day Adventist" that has not been registered. (*Id.* ¶ 36.) The Plaintiffs assert that they are "legally equivalent terms," however, and that "SDA" has been used by the General Conference from 1863 onwards "as part of the corporate name, the trade name, in advertising, in publishing and publications, and in the performance of services." (*Id.* ¶¶ 40-41.)

The Defendant is the pastor of a church he currently calls "A Creation Seventh Day & Adventist Church," (D.E. No. 37 Ex. 2 to Pls.' Statement of Undisputed Facts, Dep. of Walter McGill, at 5), although in his Answer to the Complaint he referred to it as the "Creation Seventh Day Adventist Church," (D.E. No. 4, Answer, at 1). His church has three members. (D.E. No. 37 Ex. 2 to Pls.' Statement of Undisputed Facts, Dep. of Walter McGill, at 7.) There is a second three-member church associated with his, which has the same name and is located in British Columbia, Canada. (*Id.* at 8-9.) In addition, there are other congregations that the Defendant "raised up" in the United States, which have been apostatized, or diverted from the faith. (*Id.* at 9.)

McGill was originally baptized in a Seventh Day Adventist church affiliated with

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[1] The plaintiffs do not allege that McGill infringed the trademark for "General Conference of Seventh-day Adventists."

> the Plaintiffs. (*Id.* at 16.) After several years, however, the Defendant decided to separate from the church because of a theological dispute (*Id.* at 18.) In 1990, McGill formed his current church, taking its name from a divine revelation. (*Id.* at 34, 37.) While the Defendant was aware that the Plaintiffs had trademarked the name "Seventh Day Adventist," he used it anyway, because he believed that he was divinely mandated to do so. (*Id.* at 40.) McGill has also created the following internet domain names, among others: "7th-day-adventist.org," "creation-7th-day adventist-church.org," "creationseventhday-adventistchurch.org," "creationsda.org," and "csda.us." (D.E. No. 37, Pls.' Statement of Undisputed Facts ¶¶ 13-14.) The Plaintiffs have not granted him any licenses to use their marks. (*Id.* ¶ 33.)

Gen. Conference Corp. of Seventh-day Adventists v. McGill, 624 F. Supp. 2d 883, 888-90 (W.D. Tenn. 2008).

On September 22, 2006, the plaintiffs filed a complaint in federal district court alleging trademark infringement, unfair competition, and dilution of marks under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a), 1125(c); cybersquatting under 15 U.S.C. § 1125(d)(1); unfair and deceptive trade practices under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101; common law trademark infringement and unfair competition; and injury to business reputation and dilution of marks under Tenn. Code Ann.

§ 47-25-513. McGill filed an answer on October 17, 2006, raising as affirmative defenses the First Amendment, the Commerce Clause, laches, fair use, failure to state a claim, the fact that the trademarked terms are generic and that his use of similar terms do not cause confusion, and the assertion that the plaintiffs had lost their right to trademark protection "by deviation of doctrine from the religion of Seventh Day Adventism as it was originally formed." Answer ¶¶ 71-78 (Dist. Ct. Dkt. Doc. 4).

On September 26, 2007, McGill filed a motion to dismiss. Therein, he argued that the court lacked subject matter jurisdiction because it could not decide the intellectual-property issue without resolving an underlying dispute over religious doctrine. He also argued that the plaintiffs had failed to state a claim because RFRA renders trademark law inapplicable to him and because "Seventh-Day Adventism" is a religion and thus inherently generic and incapable of being trademarked. The district court denied the motion in full on May 5, 2008. It held that trademark law was applicable despite the Free Exercise Clause, that McGill had waived the RFRA defense by failing to raise it in his answer, and that whether the trademarked terms are generic is a factual issue that could not be resolved on a motion to dismiss.

On October 31, 2007, the plaintiffs moved for summary judgment. On June 11, 2008, the district court granted the motion in part and denied it in part. The court determined that the trademarks for "Seventh-day Adventist" and "Adventist" had become

"incontestable" under 15 U.S.C. § 1065, meaning that they are presumptively valid and that McGill had the burden of showing otherwise. The court concluded that McGill could not overcome the presumption as to "Seventh-day Adventist," but that there was a genuine issue of material fact as to the genericness of "Adventist." The court further found that the plaintiffs bore the burden of establishing the validity of their "SDA" mark but were not entitled to summary judgment on this point. The court then found that the plaintiffs had established that McGill's use of their marks was likely to cause confusion among the relevant audience. Finally, the district court rejected all the defenses that McGill raised in his answer. In sum, the district court granted the plaintiffs summary judgment on their infringement claims with respect to "Seventh-day Adventist" but denied it with respect to "Adventist" and "SDA."

During a May 30, 2008 telephone status conference, the parties agreed to mediate. The district judge referred the case to a magistrate judge, who on June 3, 2008 (a week before the summary-judgment order issued) scheduled the mediation for July 15, 2008. Shortly before that date, McGill's lawyer indicated that McGill would not attend the mediation. On July 24, 2008, McGill's lawyer filed a motion to amend the pretrial order to remove the mediation requirement because McGill's "religious convictions will not allow him to compromise his faith." Mot. to Amend at 2 (Doc. 71). That same day, McGill's lawyer moved to withdraw. The district court granted the motion to

withdraw and denied McGill's motion to amend, ordering the parties to reset the mediation and warning that failure to attend could result in dismissal or default judgment. The parties conferred with the magistrate judge's office. New counsel for McGill indicated that McGill would not attend or allow counsel to attend. The plaintiffs requested a status conference, which was held on August 26, 2008. The district court again ordered the parties to schedule mediation and to certify to the court that they would attend. The parties scheduled the mediation for October 2, 2008. On September 4, 2008, the plaintiffs filed a certification expressing their intent to attend the conference, and defense counsel filed a certification indicating that McGill would *not* attend. The magistrate judge cancelled the mediation, and the plaintiffs moved for default judgment due to McGill's repeated violation of the court's order. On May 28, 2009, the district judge granted the motion. *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, No. 06-cv-1207, 2009 WL 1505738 (W.D. Tenn. May 28, 2009).

McGill then filed a notice of appeal and a motion to stay the district court's injunction against his continued use of the marks in his promotional materials. The district court denied McGill's motion to stay and entered judgment.

II. ANALYSIS

McGill appeals the denial of his motion to dismiss, the grant of partial summary judgment to the plaintiffs, and the entry of default judgment against him. As the plaintiffs point out, although McGill appealed the default-judgment order, he did not present argument regarding that order in his brief and has thus waived any argument that the order should not have been entered. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005). The failure to challenge the default-judgment order, however, does not end our inquiry. A default judgment does not preclude review of whether the allegations in the complaint, if taken as true, "were sufficient to state a claim and support a judgment of liability." *United States v. Conces*, 507 F.3d 1028, 1038-39 (6th Cir. 2007); *see also Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1079-80 (6th Cir. 1990). Furthermore, it is not clear that the default-judgment order superseded the summary-judgment order. Thus, we review the district court's denial of McGill's motion to dismiss and its partial grant of the plaintiffs' motion for summary judgment. In both cases, our review is de novo. *Autozone, Inc. v. Tandy Corp.*, 373 F.3d 786, 792 (6th Cir. 2004); *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002).

In challenging those orders, McGill makes four arguments: (1) the district court lacked subject-matter jurisdiction; (2) the district court should have dismissed the case or denied summary judgment under RFRA; (3) Seventh-day Adventism is a religion

and thus not eligible for trademark protection as a matter of law; and (4) there were genuine issues of material fact regarding whether the marks were generic and concerning the likelihood of confusion caused by McGill's use of the marks.

A. Subject-Matter Jurisdiction

McGill argues that the First Amendment precluded the district court from exercising jurisdiction because the district court could not apply neutral principles of trademark law without resolving an underlying doctrinal dispute: to wit, who are the "true" Seventh-day Adventists. He argues in the alternative that we should create a prudential exception of sorts to relinquish jurisdiction in cases like the one at bar.

As this case involves the enforceability of intellectual-property rights, it makes sense to consider the Supreme Court's precedents in the area of church property disputes. *See Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1246-48 (9th Cir. 1999). The Supreme Court has recognized that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1960). But the Court has also held that courts may apply "neutral principles of law" to resolve church property

disputes. *Jones v. Wolf*, 443 U.S. 595, 604 (1979); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 367-68 (1970). Unlike in *Presbyterian Church*, in which property rights turned on whether a church had abandoned the tenets of the faith, this case does not require us to decide any issue of church doctrine. Both the plaintiffs and McGill believe that the second coming of Christ is imminent and that the Sabbath should be celebrated on Saturday. Their dispute concerns whether McGill can use the plaintiffs' marks to promote his church's services and materials. Plainly, the case can be resolved using the neutral principles of trademark law.

The Ninth Circuit case *Maktab* is instructive. That case concerned a Sufi order in which property rights, including the right to use certain trademarked names and symbols, were passed from one spiritual leader, known as the Teacher, to the next. The order had splintered, and the two resulting sects disputed which was the true successor to the last Teacher. The district court held that it had no jurisdiction to resolve a trademark-infringement claim brought by one sect against the other, as that would require it to decide the doctrinal issue of proper succession. The Ninth Circuit reversed, holding that "the district court can apply the regular factors that courts employ to determine infringement" and that "[t]he defendants can raise neutral defenses, such as prior use of the marks." *Maktab*, 179 F.3d at 1249. Like *Maktab*, the instant case can be resolved based on trademark

law, without addressing any doctrinal issues. Trademark law will not turn on whether the plaintiffs' members or McGill and his congregants are the true believers.[2]

Anticipating the neutral-principles approach, McGill asks us to create an exception to jurisdiction for situations in which "there is (1) religious use of (2) intellectual religious property and the application of neutral principles could, in effect, (3) decide a doctrinal dispute and (4) deprive one party the right to the free exercise of its religion." Appellant Br. at 13. In support of his proposed rule, McGill cites a set of cases involving the so-called ministerial exception to employment-discrimination statutes. The ministerial exception "precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees." *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007). In essence, McGill asks the panel to create an analog to the ministerial exception under trademark law for litigants in his position.

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[2] It is relevant, however, whether "Seventh-day Adventist" describes a church or organization or, instead, a religion. If it describes a religion, then the term would not be subject to trademark protection. This is not a jurisdictional issue, but rather an issue about the validity of the trademarks. We address it below in Part C.

We decline the invitation. The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which "concern[] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law." *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986). In fact, in blessing the ministerial exception, the *Hutchison* panel *distinguished* its facts from church property cases. The panel acknowledged that the neutral-principles approach governed in church property cases, but emphasized that that approach had never been applied to the realm of clergy employment and discipline. *Id.* It would be a perversion of the case law, and contrary to the *Jones* line of cases, now to carve out an exception to the neutral-principles approach in property cases.

To sum up, the district court properly exercised subject-matter jurisdiction over this case, and we do so now, as well.

B. RFRA

McGill claimed below that the enforcement of the plaintiffs' trademarks would violate his Free Exercise Clause rights because his religion mandates him to call his church "Creation Seventh Day Adventist." He argues, in essence, that his religious beliefs *require* him to violate the law and that the enforcement of the law against him is therefore unconstitutional.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted) (holding that state could deny unemployment benefits to drug users, including Native Americans who had ingested peyote for sacramental purposes). Under *Smith*, McGill would have no free-exercise defense to trademark law, which is neutral and generally applicable. In 1993, however, Congress enacted RFRA to restore the strict-scrutiny test of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), that *Smith* had overruled:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1. In *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997), the Supreme Court held that the enactment of RFRA, as applied to the states, exceeded Congress's remedial powers under § 5 of the Fourteenth Amendment. The Court has since vindicated the application of RFRA against the *federal* government. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (upholding the grant of a preliminary injunction to potential targets of federal drug prosecution under RFRA).

RFRA would appear to trigger strict scrutiny in this case. For a party to assert RFRA as a claim or a defense, "governmental action must (1) substantially burden, (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). So far, no one has questioned the sincerity of McGill's belief that God requires him to continue his infringing use of the plaintiffs' marks. Being compelled to stop could substantially burden his religious practice. *See O Centro Espirita*, 546 U.S. at 426 (government conceded that application of Controlled Substances Act to plaintiffs, who received communion through a sacramental tea containing a Schedule I drug, would substantially burden a sincere exercise of

religion). McGill cannot claim the benefit of RFRA, however, because as we explain, the defense does not apply in suits between private parties.[3]

This case presents an issue of first impression in this circuit: whether RFRA applies only in suits against the government or also in suits by private parties seeking to enforce federal law against other private parties. The text of the statute makes quite clear that Congress intended RFRA to apply only to suits in which the government is a party. Then-Judge Sotomayor discussed the relevant provisions in a dissent in the Second Circuit:

> Two provisions of the statute implicitly limit its application to disputes in which the government is a party. Section 2000bb-1(c) states that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a *government*" (emphasis added). . . . When read in conjunction with the rest of the statute, . . . it becomes clear that this section reflects Congress's understanding that RFRA claims and defenses would be raised only against the government. For instance, section

[3] Because we hold that RFRA does not apply to suits between private parties, we do not reach the issues of whether McGill waived the defense by failing to raise it in his answer and whether the district court properly denied leave to amend his answer.

> 2000bb-1(b) of RFRA provides that where a law imposes a substantial burden on religion, the "*government*" must "demonstrate[ ] . . . that application of the burden" is the least restrictive means of furthering a compelling governmental interest (emphasis added). The statute defines "demonstrate" as "meet[ing] the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). Where, as here, the government is not a party, it cannot "go[ ] forward" with any evidence. In my view, this provision strongly suggests that Congress did not intend RFRA to apply in suits between private parties.
>
> I recognize that according to RFRA's "applicability" section, the statute applies "to all Federal law." 42 U.S.C. § 2000bb-3. This provision, however, is not inconsistent with a finding that the statute does not apply to suits between private parties. Read in conjunction with the rest of the statute, the provision simply requires courts to apply RFRA "to all Federal law" in any lawsuit to which the government is a party.

Hankins v. Lyght, 441 F.3d 96, 114-15 (2d Cir. 2006) (Sotomayor, J., dissenting) (footnotes omitted). We note further that Congress repeatedly referred to government action in the findings and purposes sections of RFRA. Congress found that "*governments* should not substantially burden religious exercise without compelling justification," that the pre-*Smith* regime had required that "the *government* justify

burdens on religious exercise," and that strict scrutiny was necessary for "striking sensible balances between religious liberty and competing prior *governmental* interests." 42 U.S.C. § 2000bb(a) (emphases added). Congress described RFRA's purpose as "to provide a claim or defense to persons whose religious exercise is substantially burdened *by government*." § 2000bb(b) (emphasis added).

RFRA's legislative history supports our view that Congress did not intend the statute to apply against private parties. "All of the examples cited in the Senate and House Reports on RFRA involve actual or hypothetical lawsuits in which the government is a party. *See* S. Rep. No. 103-111 (1993); H.R. Rep. 103-88 (1993)." *Hankins*, 441 F.3d at 115 n.9 (Sotomayor, J., dissenting).

The majority in *Hankins*, however, saw things differently. It found RFRA's language broad enough to apply "to an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute substantially burdens his or her exercise of religion." *Id.* at 103. For three reasons, we do not follow the *Hankins* majority. First, as discussed above, RFRA's text does not support the *Hankins* majority's interpretation. Second, the *Hankins* majority limited its holding to the application of RFRA vis-a-vis federal laws that can be enforced by private parties *and* the government. That case concerned an action under the ADEA by a clergyman who had been forced into retirement. The ADEA claim could have been brought by the EEOC,

and the majority sought to avoid disparate application of the statute based on who brings discrimination charges. *Id.* There is no EEOC-like agency that can bring trademark-enforcement actions. Third, a different panel of the Second Circuit already has expressed "doubts about *Hankins*'s determination that RFRA applies to actions between private parties." *Rweyemamu v. Cote*, 520 F.3d 198, 203 (2d Cir. 2008). That panel stated that "we think the text of RFRA is plain," credited Judge Sotomayor's dissent, and concluded that RFRA should not apply to purely private disputes "regardless of whether the government is capable of enforcing the statute at issue." *Id.* at 203 n.2.

Meanwhile, the other two circuits to have reached the issue have held that RFRA does not apply to suits between private parties. *See Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (calling the *Hankins* decision "unsound" and explaining that "RFRA is applicable only to suits to which the government is a party"); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) ("It seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation."); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834, 837-43 (9th Cir. 1999) (noting that Congress did not specify that RFRA applies to nongovernmental actors, as it typically does when intending to regulate private parties, and holding that private parties could not be

considered state actors under RFRA unless they acted jointly with government officials to violate free-exercise rights). We now join their ranks.

C. Whether "Seventh-day Adventism" Can Be Trademarked

"The existence and extent of trademark protection for a particular term depends on that term's inherent distinctiveness. Courts have identified four general categories of terms: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful." *Bath & Body Works, Inc. v. Luzier Personalized Cosmetics, Inc.*, 76 F.3d 743, 748 (6th Cir. 1996) (internal quotation marks omitted). "If a mark's primary significance is to describe a type of product rather than the producer, it is generic. . . ." *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 404 (6th Cir. 2002). A generic mark cannot be protected as a trademark. *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 513 (6th Cir. 2007). McGill argues that "Seventh-day Adventism" refers to a religion, is therefore a generic term, and thus cannot be trademarked.[4]

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[4] As the district court explained, the plaintiffs' marks have become "incontestable" under the Lanham Act. *See* 15 U.S.C. § 1065 (explaining that a mark can attain this status if it is registered for five years and no adverse decision as to its ownership or validity has been rendered). In *Sovereign Order of Saint John of Jerusalem, Inc. v. Grady*, 119 F.3d 1236 (6th Cir. 1997), a panel of this court held that because the name of the

(Continued on following page)

McGill's argument is certainly logical: well-known terms that society understands to refer to a particular faith in general are generic, and no single party can prevent others from using them. *See, e.g., Christian Science Bd. of Dirs. of the First Church of Christ, Scientist v. Evans*, 520 A.2d 1347, 1352-53 (N.J. 1987) ("Christian Science" is a religion and therefore a generic name not entitled to trademark); *McDaniel v. Mirza Ahmad Sohrab*, 27 N.Y.S. 2d 525, 527 (N.Y. Sup. Ct. 1941) (holding that Baha'ism is a religion and that the use of word "Baha'i" could not be enjoined because "members of the same religion[ ] have an equal right to use the name of the religion"); *New Thought Church v. Chapin*, 159 A.D. 723, 724-25 (N.Y. App. Div. 1913) (denying injunction because plaintiffs claimed that "New Thought" referred to a religion and they could not "claim a monopoly of teaching this form of religious faith"); *cf. TE-TA-MA*

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plaintiffs' religious organization had become incontestable, it could not be challenged on the ground that it was the generic name of a religion. *Id.* at 1240-41 (holding that incontestable marks are "subject only to the eight defenses specified in § 1115(b)"). This holding is directly contradicted by the text of the incontestability provision, which states that "no incontestable right shall be acquired in a mark which is the generic name for the goods or services or a portion thereof, for which it is registered." § 1065(4). The later case *Nartron* correctly articulated the law in stating that a "mark's incontestable status . . . does not protect it from a challenge . . . premised on a claim that it has become generic." *Nartron*, 305 F.3d at 405; *see also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 195 (1985) ("An incontestable mark that becomes generic may be canceled at any time pursuant to [15 U.S.C. § 1064].").

Truth Found.-Family of URI, Inc. v. World Church of the Creator, 297 F.3d 662, 666 (7th Cir. 2002) ("Church of the Creator" describes a Christian denomination, not a religion, and is not generic); *Nat'l Spiritual Assembly of the Baha'is Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Baha'is, Inc.*, 150 U.S.P.Q. 346, 354 (N.D. Ill. 1966) (enjoining defendants' use of "Baha'i" because "the public has come to recognize the designation[] 'Baha'i' . . . as identifying the [plaintiff organization] and the Baha'i Faith as administered by [it]").

This circuit has held that "[w]hether a name is generic is a question of fact." *Bath & Body Works*, 76 F.3d at 748. "The appropriate test for genericness is whether the public perceives the term primarily as the designation of the article." *Id.* (internal quotation marks omitted). It would be inappropriate to conclude as a matter of law, regardless of the evidence that could be adduced (and that was presented at summary judgment in this case), that the public considers "Seventh-day Adventist" to refer generically to a religion.[5] *See Gen. Conference Corp. of Seventh-day Adventists v. Seventh-day Adventist Congregational Church*, 887 F.2d 228, 230-31 (9th Cir. 1989) (judgment on the pleadings was improper because defendants argued that Seventh-day Adventism was a

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[5] In their reply to McGill's response to their summary-judgment motion below, the plaintiffs stated that their organization's "members are followers of the Christian faith." SJ Reply at 2 (Doc. 59).

religion and thus generic); *Gen. Conference Corp. of Seventh-day Adventists v. Perez*, 97 F. Supp. 2d 1154, 1162 (S.D. Fla. 2000) (court, sitting as factfinder after a bench trial, found that "Seventh-day Adventist" referred to the plaintiffs' church, not a religion, in the eyes of the public); *Stocker v. Gen. Conference Corp. of Seventh-day Adventists*, 39 U.S.P.Q. 2d 1385, 1996 WL 427638, at *11-17 (Trademark Tr. & App. Bd. 1996) (reviewing testimony, reference materials, and survey evidence and concluding that petitioners had not met burden of establishing genericness for cancellation of trademark). *But see Gen. Conference Corp. of Seventh-day Adventists v. Seventh-day Adventist Kinship, Int'l, Inc.*, No. CV 87-8113, 1991 WL 11000345, at *6-7 (C.D. Cal. Oct. 7, 1991) (holding, apparently as a matter of law, that "Seventh-day Adventist" has a dual meaning, referring to the church and to adherents of the religion, and that a support group for gay and lesbian followers could use the term; but also noting that the result might be different if the defendants had used "Seventh-day Adventist" as part of a church's name).

McGill makes one last effort to secure a legal ruling of genericness. He argues that the plaintiffs here should be collaterally estopped from denying that "Seventh-day Adventist" refers to a religion because that issue was decided in *Benn v. Seventh-day Adventist Church*, 304 F. Supp. 2d 716 (D. Md. 2004). In *Benn*, a student in Trinidad injured himself on a weekend retreat sponsored by an organization affiliated with the General Conference's church, and

he sued the "Seventh-Day Adventist Church" in tort. The district court found that "there is no legal entity known as the 'Seventh-Day Adventist Church'" and further remarked that "the Seventh-Day Adventist Church is a religion, not a cognizable legal entity." *Id.* at 721. Inferring that the student intended to sue the General Conference (one of the plaintiffs in the instant case), the court noted that it could substitute that entity as the defendant. But because the General Conference is an unincorporated corporation, the district court had to consider the citizenship of its constituent unions and missions for diversity purposes. Some of those constituent parts were aliens, like the student himself, destroying diversity. *Id.* at 721-22. The case therefore turned on the fact that the student had sued a nonentity and that the substitution of the entity he had intended to sue removed subject-matter jurisdiction. Thus, collateral estoppel does not apply because the issue of whether Seventh-day Adventism is a religion, even if it were actually decided, was not necessary to the outcome in *Benn*. *See Schreiber v. Philips Display Components Co.*, 580 F.3d 355, 367 (6th Cir. 2009).

McGill has a stronger claim for judicial estoppel based on arguments made by the General Conference Corporation in a memorandum in *Benn*, which McGill included in the record in the district court. The plaintiff-student in *Benn* added the General Conference Corporation as a defendant in his amended complaint. In opposing the student's motion to file a second amended complaint, the General Conference

Corporation contended that dismissal was required and argued the following: "By naming the 'Seventh-day Adventist Church' as a defendant, Plaintiff attempts to sue a religion rather than a religious institution. . . . [T]he Seventh-day Adventist Church is a religion that may be treated as an 'unincorporated association' only by resorting to an unconstitutional fiction." *Benn*, No. 03-330, Opp'n to Pl.'s Mot. for Leave to File Second Am. Compl. (filed as attachment to McGill's Brief in Support of Motion to Dismiss, Doc. 30-11). We have previously discussed the contours of judicial estoppel:

> The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. A court should also consider whether the party has gained an unfair advantage from the court's adoption of its earlier inconsistent statement. Although there is no set formula for assessing when judicial estoppel should apply, it is well-established that at a minimum, a party's later position must be clearly inconsistent with its earlier position for judicial estoppel to apply. Moreover, the doctrine of judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.

Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP, 546 F.3d 752, 757 (6th Cir. 2008) (citations and internal quotation marks omitted). It is clear that the General Conference Corporation gained no unfair advantage in *Benn* from that court's crediting its argument that "Seventh-day Adventist Church" refers to a religion. The dispositive points in that case were that "Seventh-day Adventist Church" was not a jural entity and that the intended defendant, the unincorporated General Conference, was not diverse from the plaintiff. Accordingly, judicial estoppel does not apply.

D. Summary Judgment

Finally, McGill challenges the district court's grant of summary judgment to the plaintiffs on trademark infringement of the mark "Seventh-day Adventist." The plaintiffs claim that the default-judgment order moots this issue because that order resolved the entire case – that is, it provided an independent basis for granting relief as to the "Seventh-day Adventist" mark. McGill replies that the default-judgment order pertained only to those claims that were not resolved at summary judgment.

Both parties find support for their positions in the district court's own language. As McGill points out, the district court concluded the default-judgment order by stating that "default judgment will be awarded to the Plaintiffs on their *remaining claims*." *McGill*, 2009 WL 1505738, at *7 (emphasis added). On the other hand, other language in the order

suggests that the order encompassed all claims. After declining the plaintiffs' request to extend the grant of partial summary judgment to cover the other marks based on the safe-distance rule,[6] the district court noted that "default judgment as a sanction provides an alternative and independent ground upon which this Court may grant the Plaintiffs' request for a permanent injunction." *Id.* at *6. The same order provided the language of the preliminary injunction, which included a prohibition on McGill's use of "Seventh-day Adventist." *Id.* at *6 n.9. Furthermore, in denying McGill's motion to stay the injunction pending appeal, the court remarked that "this case was not decided on the merits of the claims." Order Denying Mot. to Stay at 3 (Doc. 103). It explained that the case had been resolved on default judgment based on "the Defendant's willful refusal to comply with this Court's pretrial orders." *Id.* That order, however, came down after McGill had filed his notice of appeal, and we cannot say with confidence either that it merely clarified or that it sought to modify the default-judgment order. Under these circumstances, and given that McGill fully and properly litigated the summary-judgment stage, we take the summary-judgment order as properly before us.

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[6] Under this rule, advanced in *Broderick & Bascom Rope Co. v. Manoff*, 41 F.2d 353 (6th Cir. 1930), a party can "be required to keep a safe distance away" from using terms that resemble the validly trademarked terms, even though the former are not themselves protected. *Id.* at 354.

Summary judgment is appropriate when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This court's focus must be on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In conducting that inquiry, we draw all reasonable inferences in favor of the nonmoving party. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004).

To prevail on their claim that McGill infringed their "Seventh-day Adventist" mark, the plaintiffs had to prove that their trademark was valid and that McGill's use of the mark was likely to cause confusion among the relevant consumers of the parties' services and materials. *See Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir. 1997).

On validity, we agree with the district court first, that the mark is presumptively nongeneric and that McGill bore the burden of proving otherwise (because the marks had become "incontestable," which McGill did not challenge), and second, that he could not carry that burden. As noted above, the test for whether a term is generic and therefore ineligible for trademark protection is "whether the public perceives the term primarily as the designation of the article." *Bath & Body Works*, 76 F.3d at 748 (internal quotation marks omitted). McGill's argument for

genericness is that "Seventh-day Adventist" describes a religion, but he offers scant evidence that *the public* perceives the term as referring to a particular set of beliefs rather than to the plaintiffs' church. McGill works to show that the plaintiffs' evidence – previous judicial rulings, survey evidence, expert testimony – does not establish nongenericness by a preponderance of the evidence, but this approach gets the burden of persuasion backwards. His own evidence consists of (1) his personal testimony and that of a theology graduate student, (2) a dictionary definition, (3) a Wikipedia entry, (4) the fact that the plaintiffs use "Seventh-day Adventist" as a noun rather than an adjective, and (5) the fact that two breakaway churches use the term in their names. McGill's testimony does not provide an objective appraisal of the public's view, and the graduate student's opinion does not appear to be based on any study of popular perceptions. The dictionary and Wikipedia entries, meanwhile, concern the term "Adventist," not "Seventh-day Adventist." And the noun/adjective distinction goes not to genericness but to descriptiveness, which is no shield against a mark that has become incontestable. *Park 'N Fly, Inc.*, 469 U.S. at 196. Finally, the existence of the breakaway churches does little to help McGill. As the district court wrote, "[i]f anything, the fact that the Defendant can point to only two other splinter groups founded in the last century that bear the name supports the conclusion that members of the relevant public would generally associate the term with the churches affiliated with the General Conference." *McGill*, 624 F. Supp. 2d at 894.

Even taking the relevant public as "Christians and, more specifically, Adventist Christians (that is, those who believe in the nearness of the second coming of Christ)," *Stocker*, 1996 WL 427638, at *11, 17, McGill has adduced insufficient evidence to show that this group would understand "Seventh-day Adventist" as referring to certain religious beliefs rather than to the plaintiffs' church.

We likewise agree with the district court that no reasonable jury could find other than that McGill's use of the mark is likely to cause confusion among the public. The plaintiffs retain the burden of persuasion on this element. *Interactive Prods. Corp. v. A2Z Mobile Office Solutions, Inc.*, 326 F.3d 687, 694 (6th Cir. 2003). The following factors should be considered in determining likelihood of confusion: "1) the strength of the senior mark; 2) relatedness of the goods and services; 3) the similarity of the marks; 4) evidence of actual confusion; 5) the marketing channels used; 6) likely degree of purchaser care; 7) the intent of the defendant in selecting the mark; and 8) the likelihood of expansion of the product lines." *Id.* The district court considered these factors and found that "[a]lmost every single factor weighs in the Plaintiffs' favor; those that do not are less worthy of consideration when they favor an alleged infringer." *McGill*, 624 F. Supp. 2d at 900.

We will not review each factor here; suffice it to say that we concur with the district court's thoughtful and thorough review of the evidence. Instead, we address McGill's main challenge to the district court's

analysis, that it misjudged the factors in light of the identity of the relevant public. McGill argues that the relevant public – those who believe in the imminence of Christ's return and that the Sabbath should be observed on Saturday – are so discerning that there is a genuine issue of material fact about the likelihood that they would confuse McGill's church for the plaintiffs' church. But while it may indeed be hard to envision a person mistakenly joining the wrong church, it is not at all difficult to imagine a person consuming McGill's published materials and ascribing his teachings to the General Conference, especially in light of the relatedness of the parties' services and similarity of the marks. Accordingly, we agree that the plaintiffs were entitled to summary judgment on the likelihood of confusion, and we uphold the district court's judgment as to the mark "Seventh-day Adventist."[7]

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** the district court's denial of McGill's motion to dismiss, its grant of partial summary judgment to the plaintiffs, and its default judgment against McGill.

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[7] McGill raised a number of defenses in his answer, but he did not argue them at summary judgment and he does not do so on appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS and GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, an Unincorporated Association,

Plaintiffs,

No. 06-1207

v.

WALTER MCGILL, d/b/a CREATION SEVENTH DAY ADVENTIST CHURCH, et al.,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

(Filed Jan. 6, 2010)

Before the Court is the Report and Recommendation on Contempt and Sanctions issued by United States Magistrate Judge Edward G. Bryant on December 14, 2009, pursuant to an order of reference, in which Judge Bryant recommended, *inter alia*, that Defendant, Walter McGill, be held in civil contempt. (Docket Entry ("D.E.") No. 111.) The report sets forth a thorough and accurate assessment of the applicable law, which need not be repeated here, and recounts

numerous efforts on the part of both the Court and the Plaintiffs to inveigle the Defendant's cooperation with procedural rules and court orders – all to no avail, despite repeated warnings that Defendant's continued recalcitrance could result in a finding of contempt for his violation of this Court's May 28, 2009 Injunction Order (the "Injunction Order"). (D.E. No. 98.)

The magistrate judge's recommendation that Defendant be held in contempt was based on the Defendant's failure to comply with the Injunction Order – specifically, through the continued use of proscribed domain names and websites, as well as signs and promotional materials that violate the injunction. This Court scheduled a hearing for November 5, 2009 on Plaintiffs' Renewed Motion and Memorandum for an Order to Show Cause (D.E. No. 105), but the Defendant neither responded to the motion nor appeared at the hearing. Further, the Plaintiff has failed to file an objection to the report and recommendation, and the time for doing so has elapsed.

Therefore, the magistrate judge's report and recommendation is hereby ADOPTED in full. The Court holds the Defendant in contempt for his willful failure to abide by this Court's orders. Pursuant to the magistrate judge's recommendation, the Court finds that limited discovery is appropriate for the purpose of permitting Plaintiffs to ascertain the identities of those who may have acted in concert with Defendant in this matter. Defendant is hereby

ORDERED to cooperate fully with Plaintiffs in such limited discovery. The Court further finds that the following domain names and the websites located at such domain names violate the Injunction Order, and that all persons acting in concert with Defendant – including any website hosting companies and domain name registrars – are hereby ENJOINED from using or enabling the use of such domain names and websites:

www.creationseventhdayadventistchurch.ca
www.csdadventistchurch.co.cc
www.csdachurch.co.cc/
www.csdachurch.0adz.com
www.creationsdadventistrelief.to
www.csda-adventistchurch.to
www.creationsdadventistrelief.to
www.adventistry.org
www.creationseventhdayadventist.org.rw
www.creationsdarelief.0adz.com
www.seventhdayadventistsda-v-creation7thday adventistcsda-uslawsuit.net
www.seventhdayadventism.org
www.7thdayadventism.org/
www.whypastorwaltermcgillisnotaffiliatedwithgcsda adventistchurch.net
www.csdachurch.wordpress.com
www.csda-korea.org
www.creationseventhdayadventistreliefprojectsint.ltd.ug
www.seventhdayadventistchurchfoundwanting.us
www.home.comcast.net/~7thdayadventist
www.home.comcast.net/~csdachurch
www.home.comcast.net/~creationsda
www.home.comcast.net/~creation-adventist
www.binaryangel.net

www.thefourthangel.net
www.home.comcast.net/~creation-sabbath
www.home.comcast.net/~barbara_lim
www.home.comcast.net/~crmin

The Court further holds that Plaintiffs or their agents should be and are permitted to remove and permanently dispose of Defendant's signs and promotional materials that violate the Injunction Order, with the costs of such removal and disposal to be taxed to Defendant. Defendant's counsel should accompany Plaintiffs or their agent(s) during the removal of any infringing materials, and prior to the removal of any such signs or materials, Plaintiffs' counsel shall notify Defendant and any building managers, property owners, or landlords who may be affected. Finally, the Court ORDERS the Defendant to pay attorneys' fees and costs to the Plaintiffs in the amount of $35,567.00.

IT IS SO ORDERED this, the 6th day of January, 2010.

s/ J. DANIEL BREEN
UNITED STATES
DISTRICT JUDGE

APPENDIX C

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that –

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are –

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398

(1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

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§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

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§ 2000bb-2. Definitions

As used in this chapter –

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

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§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

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§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.